SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 15

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF THE LAST WILL OF MRS. S. B. GUNTER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCIUT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 3]

IN UNITED STATES DISTRICT COURT, NORTHEASTERN DIVISION, NORTHERN DISTRICT OF ALABAMA

E. P. JACOBS, Plaintiff,

vs.

UNITED STATES, Defendant

PETITION—Filed August 13, 1928

To the Honorable William I. Grubb, United States District Judge for the Northern District of Alabama:

Petitioner respectfully represents:

1st. That his full name is Elmer Pruitt Jacobs. Petitioner is now, and for many years heretofore, has been a resident and citizen of Bridgeport, in Jackson County, Alabama, within the Northeastern Division of the Northern District of Alabama, and within the territorial jurisdiction of this Court.

2nd. Your petitioner has a claim against the United States under an implied contract, for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

3rd. In October, 1925, and before and after that time your petitioner was, has been and still is the owner of a farm lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

[fol. 4] Bounded on the North by the lands of Gunter, Tucker and McCampbell; on the East by Mrs. Gunter; on the South by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

4th. Petitioner further shows that for several years before and after October, 1925, the government of the United States has been and still is in the exercise of its power of eminent domain under the constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things,

in the work of improving navigation on the Tennessee River along its course, through the State of Tennessee, and through the State of Alabama. This work has been and is being accomplished by the erection, construction, maintenance and operation of dams, locks and other structures in the bed of the said river and across the channel thereof at strategic locations along the course of said river, designed to obstruct the flow of the current of said river and to dam up and hold the waters of the same so as to deepen the channel, and thereby provide water of sufficient depth throughout the year to facilitate navigation upon said river.

Among other works of internal improvement undertaken and carried to completion by the United States, pursuant to the authority of the Constitution and Acts of Congress, above referred to, was and is the construction, maintenance and operation of a dam across the bed or channel of the Tennessee River in Jackson County, Alabama, a few miles South of the Tennessee State line at a location known as Widow's Bar, which dam is known and designated in the [fol. 5] Engineers Office of the War Department of the United States as Widow's Bar Dam. The said Widow's Bar Dam was built by the United States across the bed or channel of the Tennessee River to a height sufficient to raise the stage of the river at the dam at all seasons from ten to twenty feet. This dam was completed by the United States in October, 1925, and is a permanent work of internal improvement, permanently damming up and raising the level of the water in the river from ten to twenty feet, as stated. The effect of this dam was to back up the water in the channel of the river and out over adjacent lands along the channel of the river up to and above the farm owned by your petitioner, above described, which is situated several miles up the river Northward and above the location of said dam. The water in the channel of the Tennessee River and in said Jones Creek oposite the said farm of your petitioner is raised by the said Widow's Bar Dam about six feet above the natural level and flow of the river and creek, which existed previous to the construction of said dam. This causes the water of the said Tennessee River to be kept back and to flow back, and to be raised and elevated above the natural height of the said river along its natural bed, and causes the same to flow out upon and over the land of your petitioner and to stand thereon continuously in the swags, lagoons and low places.

The said farm of your petitioner, above described, is low land, commonly known as Tennessee River bottom land, being very rich, alluvial soil, and under natural conditions was capable of cultivation and the production of valuable crops each year. By reason of the construction [fol. 6] of said Widow's Bar Dam by the United States government and the constant backing up and flow of the water upon and over the land of your petitioner, a substantial part of your petitioner's land is permanently overflowed and destroyed for farming purposes.

Moreover, the Tennessee River at the point where it flows by your petitioner's said farm is approximately one-half mile in width, and down to that point serves to drain East Tennessee, Western North Carolina and Southern Virginia. Over this large water-shed heavy rains are frequent, causing constant fluctuation in the flow of the water and in the spread of the river along and opposite to the said farm of your petitioner.

Previous to the construction of the said Widow's Bar Dam by the government of the United States, the natural fluctutaion in the spread and flow of the river caused by the rains over the water-shed drained by said river did no damage to your petitioner's said farm, and the crops planted thereon, because the heaviest rains throughout the said water-shed causing a substantial rise in said river occurred during the fall, winter and early spring months, and not during the planting and growing season of the crop year. During such times if the river should overflow its banks and spread over the lands of your petitioner, it did not destroy any crops. Moreover, the channel and flower of the river being unobstructed, the waters flowed off so rapidly that the tide of the river soon passed and the waters receded from the lands of your petitioner. The rains which occurred during the summer and during the planting and growing season for the cultivation of crops on said farm rarely raised the river sufficient to [fol. 7] cause the same to back out over any substantial part of your petitioner's said farm. If such rains did occur, so that some part of the farm became overflowed during the planting season, the channel of the river being unobstructed, the tide soon passed and the water of the river receded to its normal flow before damage was done

to your petitioner's said farm and to the crops planted and growing thereon.

Your petitioner would now show that since the construction, completion and maintenance of the said Widow's Bar Dam by the government of the United States in October, 1925, the waters of the river are not only held continuously by the dam over a large part of your petitioner's said land, but the frequent recurring rise in said river, incident to heavy rains throughout the water-shed drained by said river, causes a much higher rise and higher crest of the flood waters upon said river and cause the frequent rises in the river to overflow petitioner's said lands, which previously had not spread over petitioner's said land at all; or, if they were high enough to spread over the same, they had receded so as to do no damage.

But now since the construction of the dam, the waters from said river spread over petitioner's said farm to a much larger extent and remain thereon for a much longer period of time, so that a large part of your petitioner's very best and most productive land, approximating two hundred and twenty-five acres, is taken and destroyed so that your petitioner is unable to cultivate the same or to realize any return therefrom.

[fol. 8] This amount of land, approximating two hundred and twenty-five acres, so taken and destroyed, as above charged, is not in a solid body or uniform shape, but extends over from and across petitioner's said farm in different directions along the lagoons, ditches and low places, so that your petitioner is unable to reach other parts of the farm to cultivate same or to gather and harvest the crops therefrom. In order to avoid the entire loss and destruction of the usable value of these other parts of said farm by reason of these bogs, lagoons and swamps created by backing up the waters of the river in manner as aforesaid, it will be necessary for petitioner to construct, erect and continuously maintain dikes, causeways, bridges or crossings over said bogs, lagoons and swamps at large expense. Even with such causeways, bridges or crossings constructed, erected and maintained, the usable value of your petitioner's said remaining land will be largely taken and destroyed on account of the time, delay and expense in crossing said bogs, lagoons and swamps and reaching the isolated parts of said farm caused

by the construction, erection and maintenance of said Widow's Bar Dam by the government of the United States.

5th. Your petitioner further shows that the said acts of the government of the United States, as aforesaid, in constructing, erecting, maintaining and operating said Widow's Bar Dam, and in flowing the water of the Tennessee River upon and over the land of your petitioner in manner as aforesaid has been lawfully done by the officers and agents of the United States, under the authority of the United States in the exercise of its powers of emi- [fol. 9] nent domain and the regulation of commerce between the States, and in the improvement of navigation for that purpose along the Tennessee River as one of the channels and highways of commerce between the States.

6th. Neither the government of the United States or any officer or agent thereof, has at any time set up claim of title for right of flowage upon and over the lands of your petitioner. On the contrary, the engineers, agents and representatives of the United States, pursuant to the Acts of Congress and the order of the War Department, have made surveys upon your petitioner's said farm to ascertain the amount, extent and value of the property of your petitioner's which has been taken and appropriated by the government of the United States in the construction maintenance and operation of its said Widow's Bar Dam and have made an assessment of the value and made an offer to your petitioner, which was by your petitioner deemed inadequate and unjust compensation for the property taken. Accordingly, your petitioner declined to accept the amount offered and brings this suit to have his rights in the premises adjudged by this Court and to have judgment entered herein against the United States for the amount of his said claim.

7th. Petitioner would now show that the reasonable value of his property so taken and appropriated by the government of the United States, as above set forth, and the damages suffered by him on account of such appropriation, is the sum of $10,000.00, for which he sues herein.

[fol. 10] Premises considered, petitioner prays;

That this petition be filed by the Clerk of this Court; that copies thereof be duly certified by the Clerk for serv-

ice upon the United States District Attorney for the Northern District of Alabama and for forwarding by registered mail to the Attorney General of the United States at Washington, D. C.; that affidavit of such service be made and filed in this Court on behalf of your petitioner.

Let the District Attorney be required within the time required by law to make defense to this petition. Otherwise, let same be taken for confessed. Let the Court ascertain the amount of your petitioner's damage, file his written opinion setting forth the specific findings of fact and conclusion of law involved in the cause, and render judgment thereon in favor of your petitioner against the United States for the amount of his damages, to-wit: $10,000.00, which shall include interest from the time of the taking, to-wit: October, 1925, and for the costs of this cause.

Grant general relief.

E. P. Jacobs, Petitioner. Chas. C. Moore, Alan S. Kelly, Attorneys for Petitioner.

[fol. 11] *Duly sworn to by E. P. Jacobs. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT, NORTHEASTERN DIVISION, NORTHERN DISTRICT OF ALABAMA

AUGUSTUS A. GUNTER, Executor of the Last Will of Mrs. S. B. Gunter, Deceased, Plaintiff,

vs.

UNITED STATES, Defendant

PETITION—Filed Sept. 20, 1928

To the Honorable William I. Grubb, United States District Judge for the Northern District of Alabama:

Petitioner respectfully represents:

1st. That his full name is Augustus A. Gunter, and that his testator, Mrs. S. B. Gunter, at the time of her death, to-wit: 10 day of July, 1928, and for many years heretofore, had been a resident and citizen of Bridgeport, in Jackson County, Alabama, within the Northeastern Di-

vision of the Northern District of Alabama, and within the territorial jurisdiction of this Court.

The last will and testament of Mrs. S. B. Gunter, which appointed petitioner, was duly probated in the Probate Court of Jackson County, Alabama, on the 16 day of August, 1928, and your petitioner was duly appointed and qualified as executor of said will, and as such is vested with the right of action hereinafter stated.

[fol. 13] 2nd. Your petitioner as such executor has a claim against the United States under an implied contract, for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

3. In October, 1925, and before and after that time your petitioner testator was, and still was at the time of her death, the owner of a farm lying along the West bank of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

Bounded on the North by the lands of Cook and Kelly; on the East by Tennessee River; on the South by Troxell, and on the West by Jacobs and Whitcher, containing 103 acres, more or less.

4th. Petitioner further shows that for several years before and after October, 1925, the government of the United States has been and still is in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things, in the work of improving navigation on the Tennessee River along its course, through the State of Tennessee, and through the State of Alabama. This work has been and is being accomplished by the erection, construction, maintenance and operation of dams, locks and other structures in the bed of the said river and across the channel thereof at strategic locations along the course of said river, designed to obstruct the flow of the current of said river and to dam up and hold the waters of the same so as to deepen the channel, and thereby provide water of [fol. 14] sufficient depth throughout the year to facilitate navigation upon said river.

Among other works of internal improvement undertaken and carried to completion by the United States, pursuant to the authority of the Constitution and Acts of Congress, above referred to, was and is the construction, maintenance and operation of a dam across the bed or channel of the Tennessee River in Jackson County, Alabama, a few miles South of the Tennessee State line at a location known as Widow's Bar, which dam is known and designated in the Engineer's Office of the War Department of the United States as Widow's Bar Dam. The said Widow's Bar Dam was built by the United States across the bed or channel of the Tennessee River to a height sufficient to raise the stage of the river at the dam at all seasons from ten to twenty feet. This dam was completed by the United States in October, 1925, and is a permanent work of internal improvement, permanently damming up and raising the level of the water in the river from ten to twenty feet, as stated. The effect of this dam was to back up the water in the channel of the river and out over adjacent lands along the channel of the river up to and above the farm owned by your petitioner testator, above described, which is situated several miles up the river Northward and above the location of said dam. The water in the channel of the Tennessee River opposite the said farm is raised by the said Widow's Bar Dam about six feet above the natural level and flow of the river which existed previous to the construction of said dam. This causes the water of the said Tennessee River to be kept back and to flow back, and to be raised [fol. 15] and elevated above the natural height of the said river along its natural bed, and causes the same to flow out upon and over the land of your petitioner and to stand thereon continuously in the swags, lagoons and low places.

The said farm above described is low land, commonly known as Tennessee River bottom land, being very rich, alluvial soil, and under natural conditions was capable of cultivation and the production of valuable crops each year. By reason of the construction of said Widow's Bar Dam by the United States government and the constant backing up and flow of the water upon and over the land of your petitioner, testator a substantial part of your petitioner's land is permanently overflowed and destroyed for farming purposes.

Moreover, the Tennessee River at the point where it flows by said farm is approximately one-half mile in width, and down to that point serves to drain East Tennessee, Western North Carolina and Southern Virginia. Over this large water-shed heavy rains are frequent, causing constant fluctuation in the flow of the water and in the spread of the river along and opposite to the said farm of your petitioner.

Previous to the construction of the said Widow's Bar Dam by the government of the United States, the natural fluctuation in the spread and flow of the river caused by the rains over the water-shed drained by said river did no damage to said farm and the crops planted thereon, because the heaviest rains throughout the said water-shed causing a substantial rise in said river occurred during [fol. 16] the fall, winter and early spring months, and not during the planting and growing season of the crop year. During such times if the river should overflow its banks and spread over the said lands, it did not destroy any crops. Moreover, the channel and flow of the river being unobstructed, the waters flowed off so rapidly that the tide of the river soon passed and the waters receded from the lands of your petitioners testator. The rains which occurred during the summer and during the planting and growing season for the cultivation of crops on said farm rarely raised the river sufficient to cause the same to back out over any substantial part of said farm. If such rains did occur, so that some part of the farm became overflowed during the planting season, the channel of the river being unobstructed, the tide soon passed and the water of the river receded to its normal flow before damage was done to said farm and to the crops planted and growing thereon.

Your petitioner would now show that since the construction, completion and maintenance of the said Widow's Bar Dam by the government of the United States in October, 1925, the waters of the river are not only held continuously by the dam over a large part of said land, but the frequent recurring rise in said river, incident to heavy rains throughout the water-shed drained by said river, causes a much higher crest of the flood waters upon said river and causes the frequent rises in the river to overflow said lands,

which previously had not spread over said land at all; or, if they were high enough to spread over the same, they had receded so as to do no damage.

[fol. 17] But now since the construction of the dam, the waters from said river spread over said farm to a much larger extent and remain thereon for a much longer period of time, so that a large part of the very best and most productive land, approximating sixty-five acres, is taken and destroyed so that the owner will permanently be unable to cultivate the same or to realize any return therefrom.

This amount of land, approximating sixty-five acres, so taken and destroyed, as above charged, is not in a solid body or uniform shape, but extends over from and across said farm in different directions along the lagoons, ditches and low places, so that the owner is unable to reach other parts of the farm to cultivate same or to gather and harvest the crops therefrom. In order to avaid the entire loss and destruction of the usable value of these other parts of said farm by reason of these bogs, lagoons and swamps created by backing up the waters of the river in manner as aforesaid, it will be necessary to construct, erect and continuously maintain dikes, causeways, bridges or crossings over said bogs, lagoons and swamps at large expense. Even with such causeways, bridges or crossings constructed, erected and maintained, the usable value of said remaining land will be largely taken and destroyed on account of the time, delay and expense in crossing said bogs, lagoons and swamps and reaching the isolated parts of said farm caused by the construction, erection and maintenance of said Widow's Bar Dam by the government of the United States.

5th. Your petitioner further shows that the said acts of the government of the United States, as aforesaid, in con-
[fol. 18] structing, erecting, maintaining and operating said Widow's Bar Dam, and in flowing the water of the Tennessee River upon and over the land of your petitioners testator in manner as aforesaid has been lawfully done by the officers and agents of the United States, under the authority of the United States in the exercise of its powers of eminent domain and the regulation of commerce between the States, and in the improvement of navigation for that

purpose along the Tennessee River as one of the channels and highways of commerce between the States.

6th. Neither the government of the United States, or any officer or agent thereof, has at any time set up claim of title for right of flowage upon and over the land of your petitioners testator. On the contrary, the engineers, agents and representatives of the United States, pursuant to the acts of Congress and the order of the War Department, have made surveys upon said farm to ascertain the amount, extent and value of the property which has been taken and appropriated by the government of the United States in the construction, maintenance and operation of its said Widow's Bar Dam and have made an assessment of the value and made an offer to your petitioner's testator, which was deemed inadequate and unjust compensation for the property taken. Accordingly, your petitioner's testator declined to accept the amount offered and brings this suit to have his rights in the premises adjudged by this Court and to have judgment entered herein against the United States for the amount of his said claim.

[fol. 19] 7th. Petitioner would now show that the reasonable value of the property so taken and appropriated by the government of the United States, as above set forth, and the damages suffered by petitioners testator on account of such appropriation, is the sum of $9,500.00, for which he sues herein.

Premises considered, petitioner prays:

That this petition be filed by the Clerk of this Court; that copies thereof be duly certified by the Clerk for service upon the United States District Attorney for the Northern District of Alabama and for forwarding by registered mail to the Attorney General of the United States at Washington, D. C.; that affidavit of such service may be made and filed in this Court on behalf of your petitioner.

Let the District Attorney be required within the time required by law to make defense to this petition. Otherwise, let same be taken for confessed. Let the Court ascertain the amount of your petitioner's damage, file his written opinion setting forth the specific findings of fact and conclusion of law involved in the cause, and render judgment

thereon in favor of your petitioner against the United States for the amount of his claim, to-wit: $9,500.00, which shall include interest from the time of the taking, to-wit: October, 1925, and for the costs of this cause.

[fol. 20] Grant general relief.

Augustus A. Gunter, Petitioner. Alan S. Kelly, Chas. C. Moore, Attorneys for Petitioner.

Duly sworn to by Augustus A. Gunter. Jurat omitted in printing.

[fol. 21] IN UNITED STATES DISTRICT COURT

No. 2031. At Law

A. A. GUNTER, Ex., etc.,

v.

UNITED STATES

ORDER ALLOWING AMENDMENT TO PETITION—Filed Oct. 4, 1929

In this case, comes Augustus A. Gunter, individually and Mrs. Francis G. Boys, and ask leave to join as parties Plaintiff, and say that they are the children and only devisees under the will of Mrs. S. B. Gunter, deceased, and as such take title to the land described in the petition in this cause, and join herein that the present owners of the legal title may be before the Court.

It is accordingly ordered that said parties may intervene and become parties Plaintiff and that the petition be amended to show that they are holders of the legal title to the land described in the Petition.

IN UNITED STATES DISTRICT COURT

E. P. JACOBS, Plaintiff,

vs.

UNITED STATES, Defendant

ANSWER OF DEFENDANT—Filed Oct. 5, 1928

Answer to Petition

Comes the defendant, the United States of America by its Attorney, C. B. Kennamer, United States Attorney for

[fol. 22] the Northern District of Alabama, and for answer to the petition filed by the plaintiff against the defendant on August 13, 1928, says:

That the defendant denies the allegations of the said petition in toto as set out in sections 1, 2, 3, 4, 5, 6 and 7 thereof.

C. B. Kennamer, Untied States Attorney. R. M. Sims, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

AUGUSTUS A. GUNTER, Executor of the Last Will of Mrs. S. B. Gunter, Deceased, Plaintiff,

vs.

UNITED STATES, Defendant

ANSWER OF DEFENDANT—Filed Oct. 23, 1928

Comes the defendant, the United States of America, in the above styled cause, by its attorney, C. B. Kennamer, United States Attorney for the Northern District of Alabama, and for answer to the original petition filed by the [fol. 23] plaintiff and against the defendant in said cause, says:

That the defendant denies the allegations in toto of said petition as set out in Sections 1, 2, 3, 4, 5, 6 and 7 thereof.

C. B. Kennamer, United States Attorney. R. M. Sims, Assistant United States Attorney.

MANDATE U. S. CIRCUIT COURT OF APPEALS—Filed March 11, 1931

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Northern District of Alabama, Greeting:

Whereas lately, in the District Court of the United States for the Northern District of Alabama, before you, in a cause between E. P. Jacobs, plaintiff, and United States of America, defendant, No. 323, at Law, wherein the judgment of the said District Court entered in said cause on the 21st day of January, A. D. 1930, was in favor of said defendant [fol. 24] and against, E. P. Jacobs, plaintiff, as by the in-

spection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by E. P. Jacobs agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October in the year of our Lord one thousand nine hundred and thirty, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

November 28th, 1930.

You, therefore, are hereby commanded that such execution and further procedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the Tenth day of March, in [fol. 25] the year of our Lord one thousand nine hundred and thirty-one.

Oakley F. Dodd, Clerk U. S. Circuit Court of Appeals for the Fifth Circuit.

IN UNITED STATES DISTRICT COURT

No. —

E. P. JACOBS

vs.

THE UNITED STATES

Damage Suit under the Tucker Act

ORDER ON MANDATE—Filed Oct. 6, 1931

A judgment and decree of this Court having been entered herein on the 21st day of January, 1930, in favor of

the defendant, dismissing plaintiff's petition or cause of action, and taxing petitioner with the court costs, and the plaintiff or petitioner having duly prosecuted its appeal from said judgment or decree to the United States Circuit Court of Appeals for the Fifth Circuit, and said Circuit Court of Appeals having rendered its decree reversing the judgment of this Court rendered on the 21st day of January, 1930, and remanding the cause, and having duly issued its mandate bearing date of March 10, 1931, so reversing [fol. 26] said judgment, and remanding the cause to this Court for such proceeding as according to right, justice and the law of the United States are to be had, and in accordance with said mandate, and said mandate being now before the Court, and presented herein:

Now, on motion of Chas. C. Moore, Attorney for the petitioner or plaintiff, it is hereby ordered, adjudged and decreed, that the mandate of the United States Circuit Court of Appeals of the Fifth Circuit be filed herein, and the same hereby is made the order of this Court.

It is further ordered, adjudged and decreed that the said decree and judgment rendered by this Court on the 21st day of January, 1930, be and the same is hereby set aside.

This October 6, 1931.

W. I. Grubb, United States District Judge.

O. K.

—— ——, Attorney for Petitioner. —— ——, Assistant United States Attorney, for Defendant.

[fol. 27] In United States District Court

Motion for New Trial—Filed Feb. 7, 1930

In these consolidated cases come Plaintiffs, E. P. Jacobs and Augustus A. Gunter, Executor, and move for new trial and, for grounds of motion, say:

I

The District Judge erred in holding that the damage to Plaintiffs' lands, resulting from the construction of the Widow's Bar Dam across the Tennessee River by Defendant, was tortious in its nature, for which no recovery could be had in these suits, because:

(a) The said damage was the necessary result of the building of the Dam which Defendant is presumed to anticipate and intend to pay for.

(b) Defendant's engineers had made surveys, determining the fact of flowage damage to the farms of Plaintiffs, and others, in like situation, and reported this fact to Congress before the Acts were passed authorizing the construction of this Widow's Bar Dam, and the Dam was authorized by Congress, and constructed with the intention, both on the part of Congress and the engineers of the War [fol. 28] Department in charge of construction, to pay for this flowage damage.

(c) The determination by the Board of Engineers of the United States that flowage damage would result to the farms of Plaintiffs and others in like situation, and the provisions of the Act of Congress for this damage to be paid by the United States, is conclusive on the Court in these cases, that this flowage damage is recoverable in these cases.

(d) After the Widow's Bar Dam was built, the Board of Engineers of the War Department causes surveys to be made of Plaintiff's lands, determining that 115.2 acres of the farm of Plaintiff, E. P. Jacobs, and 34.59 acres of the farm of A. Gunter's Testate, were directly damaged by overflow water from the Tennessee River, as a result of the building of this Dam, and offers were made by the Defendant to pay the damage as estimated by them. This was a construction of the law as applied to the facts of these cases by the officers charged with the execution of the law and should be followed by the Court, because not clearly shown to be erroneous.

II

The District Judge erred in holding that Plaintiffs cannot recover in these cases since their lands were not continuously overflowed by back-water from the Tennessee River, held by the Widow's Bar Dam, because an easement for flowage by intermittent but inevitably recurring floods which occur every year on the Tennessee River, is property [fol. 29] for which compensation must be paid under the Fifth Amendment and the Acts of Congress.

III

The District Judge erred in holding that Plaintiffs could not recover anything in these cases because the value of their lands was not totally destroyed. This was error because the taking of any interest in their land is the taking of property under the Fifth Amendment, and the law has authorized the taking of easements in law, as well as the fee and provides for payment to the extent taken.

IV

The District Judge erred in construing the decision of United States vs. Cress, 243rd U. S. 316, to hold that recovery could be had "only as to land which had not been affected by overflow, prior to the building of the structure", and holding Plaintiffs could not recover for the increased frequency, height and duration of floods over their lands, caused by the Widow's Bar Dam and which destroy two thirds of its value, because this Dam obstructed the natural flow of the River and caused its waters to back out over the lands of Plaintiffs, which would not have done so except for the Dam. The natural drainage area of the Tennessee River, above Widow's Bar Dam, is about twenty-five thousand square miles. Before the Dam was built, the rains which occurred during the crop season over this drainage area did not cause the River to back out over the lands of Plaintiffs often. When they did overflow Plain- [fol. 30] tiff's lands, they soon receded so that small damage was done. Since the Dam was built, and by reason of the obstruction of the Dam, each 20,000 second-feet rise is three and one-half feet higher and remains from one to two days longer than it would without the Dam. It is these frequent small rises in the River which destroy the value of Plaintiffs' lands. The fact that Plaintiffs' lands are sometimes submerged by flood water does not make them part of the River channel nor give the United States the right to increase the servitude for flowage without liability.

The foregoing motion for new trial being considered by the Court is taken under advisement and continued from term to term until the case of Jacobs vs. U. S. is decided by the Court of Appeals, and then to be ruled on according

to the decision in that case as per stipulation of parties on file.

W. I. Grubb, Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

Number —

AUGUSTUS A. GUNTER, Executor, et al.

vs.

THE UNITED STATES

Damage Suit, under the Tucker Act

JUDGMENT ON MOTION FOR NEW TRIAL—Filed Oct. 6, 1931

In this cause, it appears that a stipulation was made and filed, signed by the attorneys for the parties, agreeing that the motion for a new trial in this cause should stand continued from term to term until the United States Circuit Court of Appeals for the Fifth Circuit should decide the case of E. P. Jacobs vs. The United States, involving the same questions, and that whatever judgment is directed by the said Court of Appeals in said case, the same to govern and control in this case as to the Court's ruling on the motion for a new trial; and

It appearing from the mandate and opinion of the United States Circuit Court of Appeals of the Fifth Circuit to this Court in said case of E. P. Jacobs vs. The United States, that the judgment entered therein by this Court at a former term is reversed, and the cause remanded, with directions granting a new trial in the case:

[fol. 32] It is, therefore, ordered and adjudged that the motion for a new trial in this cause be and the same is hereby granted, and a new trial is awarded, and the cause is restored to the docket of this Court for such purpose.

This October 6, 1931.

W. I. Grubb, United States District Judge.

In United States District Court

No. 323 and No. 2031

E. P. Jacobs

vs.

The United States

and

Augustus A. Gunter, Executor, et al.

vs.

The United States

Order Consolidating Cases—Filed Oct. 6, 1931

On Motion of the Plaintiffs, it is ordered that the above styled cases, being of like nature, be consolidated and heard together as one case, and that the evidence in each [fol. 33] be considered in both, so far as relevant, and that, in event of appeal, only one record need be made and taken to the Circuit Court of Appeals.

This order was made October 4th, 1929, and is entered now for then.

W. I. Grubb, District Judge.

In United States District Court, at Huntsville, Alabama

No. 323 and No. 2031

E. P. Jacobs

vs.

The United States

and

Augustus Gunter, Executor, et al.

vs.

The United States

Final Judgment—Filed October 15, 1931

Be it remembered that the above styled cases were heard before the Honorable Wm. I. Grubb, Judge, on October 6th and 7th, 1931, upon the pleadings, mandate from the Court

[fol. 34] of Appeals in case No. 323, stipulation of facts and testimony of witnesses, from all of which the Court has made and filed his findings of fact and conclusions of law as a part of the record of said consolidated cases.

It is accordingly ordered and adjudged that E. P. Jacobs, plaintiff in case No. 323, have and recover of the United States the sum of $2,919.00 as of October 1st, 1925, together with interest thereon from said date at the rate of 6%, amounting to $1054.28, making a total of $3973.28 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 115.2 acres of said farm, lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

It is further ordered and adjudged that said plaintiff, E. P. Jacobs, recover of the United States all of the costs incurred in said case No. 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit and the remand to this Court, such costs, however, not to exceed that allowed by law under Section 152, Judicial Code.

[fol. 35] Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

It is also ordered and adjudged that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiff in case No. 2031, have and recover of the United States the sum of $1,030.00 as of October 1st, 1925 together with interest thereon from said date at the rate of 6%, amounting to $372.00, making a total of $1402.00 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 34.59 acres of said farm, lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by Tennessee River; on the south by Troxell, and on the west by Jacobs and Whitcher, containing 103 acres, more or less.

It is further ordered and adjudged that said plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd, recover of the United States all of the costs incurred in said case No. 2031, such costs, however, not to exceed that allowed by law under Section 152 of the Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage neces-
[fol. 36] sary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

To which judgments rendered aforesaid by the Court the defendant excepts.

Enter.

W. I. Grubb, Judge.

IN UNITED STATES DISTRICT COURT

No. 323 and No. 2031

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Oct. 15, 1931

These consolidated cases were tried on October 6th and 7th, 1931, when the following stipulations of fact were en-
[fol. 37] tered into by the parties and, by agreement, are made part of the findings of fact in these cases, to-wit:

Comes the parties in the above entitled cases, and agree that the following constitute certain facts therein:

(1) That the plaintiffs in both cases at the time of the bringing of these suits were resident citizens of Jackson County, Alabama.

(2) That the plaintiff, E. P. Jacobs in Case No. 323, in 1923, was at that time, and prior thereto, the owner of a

farm, lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows, to-wit:

Bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the west by McCampbell, containing 417 acres, more or less.

That the plaintiffs in the Gunter case No. 2031, in 1923, and prior thereto, were the owners of a farm, lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

Bounded on the North by the lands of Cook and Kelly; on the East by Tennessee River; on the South by Troxell, and on the West by Jacobs and Whitcher, containing 103 acres, more or less.

(3) That, for several years before and after October, 1925, the defendant, United States, has been and is still in the exercise of its power of eminent domain under the [fol. 38] constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things, in the work of improving the navigation of the Tennessee River along its course, through the states of Alabama and Tennessee, which work has been and is being accomplished by the erection, construction, operation, and maintenance of locks and dams, and other structures, in the bed of said river, across the channel thereof at strategic locations along the course of said river, thereby to provide water of sufficient depth throughout the year to facilitate navigation thereon.

(4) That the defendant, in the prosecution of such work, in accordance with the recommendations of its Board of Engineers and the Acts of Congress, passed pursuant to such recommendations, constructed a crib dam out of 10 inch square timbers bolted together and filled with rock, with a concrete apron across the bed or channel of the Tennessee River, in Jackson County, Alabama, at a location known as "Widow's Bar", located down the river about eight (8) miles below the Plaintiffs' farms and the mouth of Jones Creek, which Dam was completed October 1st, 1925.

(5) That the said Widow's Bar Dam was designed to raise the river at extreme low water at the dam about 11 feet, so as to back up the water in the river to Hale's Bar Dam, located about twenty-six (26) miles up the river from Widow's Bar Dam, raising water at Hale's Bar at extreme low water one foot, deepening the channel and forming a canal for navigation at all seasons. This Widow's Bar Dam would not cause the river to overflow the banks [fol. 39] of the river or its tributaries at low water and permanently submerge any lands, but would increase the height of intermittent rises in the river up to a volume of 150,000 ft. per second. Intermittent rises occur in the Tennesse River every year, principally the winter and early spring months.

This Widow's Bar Dam raises the level of the water in the river at extreme low water about 11 ft. at the dam, and, at a flow of 20,000 cu. ft. per second, it raises the water in the river 9.2 feet at the dam. None of the lands of either of the Plaintiffs is overflowed by the water from the river until the flow exceeds 75,000 cu. ft. per second. At the flow of 20,000 cu. ft. per second, the effect of the Dam was to raise the water in the Tennessee River at the mouth of Jones Creek, opposite the farms of the plaintiffs 3.5 ft. At this flow, the elevation of the water surface at the mouth of Jones Creek, before the Dam was built, was 585 ft.; afterwards 588.5 ft. The difference in the water levels before and after the construction of the Dam decreases now as the river rises and becomes of a greater flow at the mouth of Jones Creek, as follows:

20,000 foot flow before 585 ft., afterwards 588.5 ft. dif. 3½ ft.

50,000 foot flow before 589 ft., afterwards 591 ft. dif. 2 ft.

75,000 foot flow before 592 ft., afterwards 593.3 ft. dif. 1.3 ft.

111,500 foot flow before 595.5 ft., afterwards 596.6 ft. dif. 1.1 ft.

[fol. 40] 145,000 foot flow before 598 ft., afterwards 598.5 ft. dif. .5 ft.

150,000 foot flow before 599 ft., afterwards 599 ft. No difference.

That, at a flow of 150,000 cu. ft. per second, the effects of the dam disappear and play out, and that no lands lying above the elevation 599 ft., that were subject to overflow by the river prior to construction of the Dam, could be attributed to the construction, operation and maintenance of said Dam.

(6) The main channel of the Tennessee River above Widow's Bar Dam, has well-defined earth banks, rising to an elevation of 610 feet at the mouth of Sequatchie River, some distance above the mouth of Jones Creek, except where cut into by tributaries. That the effects of the dam play out long before the surface elevation of these river banks immediately above and below the mouth of Jones Creek are reached.

(7) That after completion of the Dam, complaint of damages were made by different land owners above the Dam, and thereupon, the defendant, the United States, caused a survey to be made of the land above Widow's Bar Dam during the summer and fall of 1928 to ascertain what lands, if any, above the Dam might have been damaged by reason of the building of the Dam, including farms of the plaintiffs in both of these suits. This survey was made by running contours at intervals of two feet elevation above the Widow's Bar Datum and calculating back water curves at various volumes of second feet flow in the river, ranging from 20,000 to 150,000 feet per second. Typographical [fol. 41] maps of this survey made by the Engineers of the United States Army show a portion of the lands of both farms to be affected on account of the construction of the said dam producing increase in the occasional overflows of said land, the result of the survey showing 115.2 acres, more or less, of the farm of E. P. Jacobs being so affected; and 34.59 acres of the Gunter farm being so affected, these acreages being found to lie between elevations 592 and 599. That pursuant to authority from the Chief Engineer of the War Department, the District Engineer's Office of the United States at Florence, Alabama, wrote a letter to each land owner thought to be affected, including these plaintiffs, the one to plaintiff, E. P. Jacobs being as follows:

September 29, 1927.

"800, 222-WB.
Purchase of flowage rights.

Mr. E. P. Jacobs, Bridgeport, Ala.

DEAR SIR: This office has had under investigation for some time the effect of the construction of Widow's Bar Dam on the value of land adjacent to the pool formed by said dam. This investigation has now been concluded and it is found that part of your land lying below 599 contour, which is 14 feet higher than the crest of the dam, is subject to overflow more frequently than before the dam was constructed.

The government, therefore, desires to purchase from you the right to overflow that portion of your land lying below the 599 foot contour, the upper limit of flood damage which can be attributed to the construction of the dam. The area of this portion is 115.2 acres, more or less, and the Chief of [fol. 42] Engineers has agreed to recommend payment of the sum of $1,082.31 for the easement of flowage on this property, subject to establishment of valid title.

Please advise me at your earliest convenience whether you are willing to accept this amount in payment of the right to overflow your land. If you will accept the amount, the necessary abstract and conveyance will be prepared as soon as practicable, free of cost to you. If an examination of your title shows that same is defective the War Department will cause condemnation proceedings to be instituted provided the amount of the award is agreed upon in advance.

In the event you are unwilling to accept the settlement offered, you may have recourse to the courts for relief, suing either in the local United States District Court or in the Court of Claims.

Yours very truly, Hugh P. Oram, Captain, Corps of Engineers, District Engineers."

The contents of the letter to plaintiff, Augustus A. Gunter, Executor, was exactly the same, except it stated that the acreage of the land affected was 34.59 acres, and that the amount recommended to — paid for an easement of flowage thereto was $473.54.

That the construction of said dam was provided for in the improvement of the Tennessee River between Chattanooga and Brown's Island, which provides for the construction of Widow's Bar Lock and Dam and Belle Fonte Island Lock and Dam, together with certain other improvements, being adopted in River and Harbor Act of July 27, 1917, subject [fol. 43] to the condition that "local interests shall assume and pay all claims for flowage damage or arrange to do so in a manner satisfactorily to the Secretary of War". The estimated cost of flowage damages for both dams was stated to be $22,000.00. In the River and Harbor Act of March 2, 1919, Congress waived the condition of local interests bearing or paying the claims of flowage damage, so that it became a charge against the United States.

It is hereby stipulated that the foregoing constitute facts in these cases for the trial thereof, and that so far as they go, the Court may make them its findings of fact in the trial of the cases.

It is further agreed that both cases be consolidated, and heard together, and one finding of facts made, and one judgment rendered for both causes.

The Court further finds from the evidence that the farm of E. P. Jacobs, containing 417 acres, described in case No. 323, was worth on October 1st, 1925, $50.00 per acre and was damaged as a whole by the reason of the taking by the United States under the 5th Amendment to the Constitution on October 1st, 1925, of an easement of flowage over 115.2 acres thereof, by the construction of the Widow's Bar Dam in the Tennessee River, to the amount of $7.00 per acre, making a total damage of $2,919.00.

The Court finds from the evidence that the farm of Augustus Gunter, Executor, et al., containing 103 acres, described in case No. 2031, was worth on October 1st, 1925, $75.00 per acre and was damaged as a whole by reason of [fol. 44] the taking by the United States under the 5th Amendment to the Constitution on October 1st, 1925, of an easement of flowage over 34.59 acres thereof by the construction of the Widow's Bar Dam in the Tennessee River, to the amount of $10.00 per acre, making a total damage of $1,030.00 to said farm.

The Court is of opinion that plaintiff, E. P. Jacobs, in case No. 323, is entitled to recover as just compensation for the taking of his said property by the United States for said

public improvement the said sum of $2,919.00 as of October 1st, 1925, together with interest thereon at the rate of 6% from that date until now as just compensation under the 5th Amendment to the Constitution of the United States.

The Court is also of opinion that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiffs in case No. 2031, are entitled to recover from the United States the said sum of $1,030.00 as compensation for the taking of their said property by the United States for said work of public improvement, as of October 1st, 1925, together with interest thereon at 6% from the date of said taking until now as just compensation under the 5th Amendment to the Constitution of the United States.

The Court is further of the opinion that the plaintiffs in each of the above styled cases are entitled to recover against the United States all of the costs of said respective cases, but such costs not to exceed that provided for under Section 152 of the Judicial Code. To which findings of facts (except those agreed to as set out) the defendant excepts. [fols. 45–140] This October 15th, 1931.

W. I. Grubb, Judge.

IN UNITED STATES DISTRICT COURT

No. 323. At Law

E. P. JACOBS

vs.

UNITED STATES OF AMERICA

and

No. 2031. At Law

AUGUSTUS GUNTER, Executor, et al.

vs.

UNITED STATES OF AMERICA

Bill of Exceptions—Filed February 25, 1932

* * * * * * *

[fol. 141] FINAL JUDGMENT

Be it remembered that the above styled cases were heard before the Honorable Wm. I. Grubb, Judge, on October

6th and 7th, 1931, upon the pleadings, mandate from the Court of Appeals in case No. 323, stipulation of facts and testimony of witnesses, from all of which the Court has made and filed his findings of fact and conclusions of law as a part of the record of said consolidated cases.

It is accordingly ordered and adjudged that E. P. Jacobs plaintiff in case No. 323, have and recover of the United States the sum of $2,919.00 as of October 1st 1925, together with interest thereon from said date at the rate of 6%, amounting to $1,054.28, making a total of $3,973.28 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 115.2 acres of said farm, [fol. 142] lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

It is further ordered and adjudged that said plaintiff, E. P. Jacobs, recover of the United States all of the costs incurred in said case No. 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit and the remand to this Court. But such costs, however, not to exceed the costs allowed by law under Section 152 of the Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

It is also ordered and adjudged that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiff in case No. 2031, have and recover of the United States the sum of $1,030.00 as of October 1st, 1925, together with interest thereon from said date, at the rate of 6%, amounting to $372.00, making a total of $1,402.00 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the [fol. 143] Tennessee River of 34.59 acres of said farm,

lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by Tennessee River; on the south by Troxell, and on the west by Jacobs and Whitcher, containing 103 acres, more or less.

It is further ordered and adjudged that said plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd, recover of the United States all of the costs incurred in said case No. 2031, such costs, however, not to exceed costs as allowed by law under section 152, Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

To which judgments rendered aforesaid by the Court, the defendant excepts.

Enter.

W. I. Grubb, Judge.

[fol. 144] MOTION FOR NEW TRIAL

Comes the defendant in the above styled causes, and moves the Court for a new trial, and for grounds thereof, assign- the following:

(1). Because the judgments in the causes are contrary to the law and the evidence.

(2). Because the evidence does not support the judgments rendered herein.

(3). Because the great weight of the evidence is contrary to the judgments rendered.

(4). Because the Court erred in assessing damages for the whole of both farms, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Jacobs land; and only 34.59 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Gunter

farm, and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all the other lands of both farms lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were subject to occasional overflows from the river before the construction of Widow's Bar Dam.

(5). Because the Court erred in estimating its damages in taking the acreage estimated in the description of the Jacobs land (said to be 417 acres more or less) when in fact, the Government's surveys by maps made evidence [fol. 145] in the case show that the Jacobs farm involved could not possibly have exceeded 280 acres, and did not base its findings upon the actual acreage of the Jacobs farm as shown by the surveys.

(6). Because the Court erred in not assessing the damage done to actual acreage affected by the dam on each farm by bringing about a slight increase — occasional overflows, namely, 115.2 acres of the Jacobs land lying between elevation- 592 and 599; and 34.59 acres of the Gunter farm lying between elevations 592 and 599.

(7). Because the Court erred in holding that the lands taken in these causes were taken under the 5th Amendment of the Constitution of the United States, and required the payment of just compensation, and that just compensation included interest on the value of the properties taken at the time of the taking up to the time of the rendition of the judgment.

(8). Because the Court erred in allowing interest as a part of the compensation for the lands taken in both causes.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney.

[fols. 146 & 147] Opinion Overruling Motion

After due consideration of the foregoing motion, the Court overrules said motion, to which ruling the defendant excepts.

W. I. Grubb, United States District Judge.

ORDER SETTLING BILL OF EXCEPTIONS

Whereupon, the defendant tenders this, its bill of exceptions to the action of the Court in the various particulars therein set out, which is signed, sealed and made a part of the record in the combined causes.

This the 25th day of February, 1932.

W. I. Grubb, Trial Judge.

O. K.

John B. Isbell, United States Attorney, for Defendant. Alon S. Kelly, Chas. C. Moore, Attorneys for Plaintiffs.

[fol. 148] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 323, No. 2031

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed January 13, 1932

To the Honorable W. I. Grubb, judge of said court:

Now comes the defendant in the above numbered and entitled causes now combined as one cause, by John B. Isbell, United States Attorney, and by R. M. Sims, Assistant United States Attorney, who file this petition by direction of the Attorney General of the United States, and feeling itself aggrieved by the final judgment or judgments of this Court, dated October 15, 1931, in said causes as combined, ordering and decreeing that the plaintiff, E. P. Jacobs in case Number 323 have and recover of the defendant the sum of $2,919.00 as of October 1st, 1925, together with interest [fol. 149] thereon from said date at the rate of 6%, amounting to $1,054.28, making a total of $3,973.28 as compensation for the taking of the right of flowage by the United States for the improvement of the navigation on the Tennessee River of 115.2 acres of his farm, lying between contour elevations 592 and 599 above Widow's Bar Datum, said farm being situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, and bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the west by McCampbell, and containing 417 acres, more or less, and

adjudging that the plaintiff, E. P. Jacobs have and recover of the defendant all of the costs incurred in said cause Number 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit, and the remand to this Court, such costs not to exceed that allowed by law under Section 152, Judicial Code; and also ordering and decreeing that the plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd in cause Number 2031 have and recover of the defendant the sum of $1,030.00 as of October 1st, 1925, together with interest thereon from said date at the rate of 6%, amounting to $372.00, making a total of $1,402.00 as compensation for the taking of the right of flowage by the United States for the improvement of the navigation of the Tennessee River of 34.59 acres of said farm, lying between contour elevations 592 and 599 above the Widow's Bar Datum, said farm being situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by the Tennessee River; [fol. 150] on the south by Troxell; and on the west by Jacobs and Whitcher, containing 103 acres, more or less, and adjudging that the plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd have and recover also the costs incurred in said cause Number 2031, such costs not to exceed that allowed by law under Section 152 of the Judicial Code, petition this Honorable Court for an order of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at Montgomery, Alabama, and files in connection herewith its Assignment of Errors.

Wherefore the defendant prays that the order of appeal be granted, returnable according to law, and that the plaintiffs in said combined cause, or their counsel, be duly cited and served with notice hereof; pray for all necessary orders and decrees necessary to finally perfect such appeal.

This January 6th, 1932.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney.

[fol. 151] ORDER

Considering the above and foregoing petition for an appeal, together with the Assignment of Errors:

It is therefore ordered that the defendant be, and it is hereby granted an appeal to the United States Circuit

Court of Appeals for the Fifth Circuit, sitting at Montgomery, Alabama, returnable according to law.

It is further ordered that notice of this appeal be duly given or served upon the plaintiffs, or their counsel, Chas. C. Moore, Chattanooga, Tennessee, and Allan S. Kelly, South Pittsburgh, Tennessee, of record, unless expressly waived by them in writing.

Thus done, ordered and signed this the 13 day of January, 1932.

W. I. Grubb, United States Judge.

[fol. 152] IN UNITED STATES DISTRICT COURT

No. 323, No. 2031

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Jan. 14, 1932

Now comes the defendant in the above numbered and entitled causes as now combined, by its attorneys, and in connection with its petition for an appeal, make and file the following assignments of error, wihch they allege occurred on the trial and hearing, and the rendition of the judgment in the causes as combined, upon which it will rely in the prosecution of this appeal, namely:

I

The District Judge erred in rendering judgment in the combined causes contrary to the law and evidence.

[fol. 153] II

The District Judge erred in rendering judgment in the combined causes, that were not supported by the evidence.

III

The District Judge erred in rendering judgment in the combined causes in favor of the Plaintiff E. P. Jacobs contrary to the great weight of evidence given in the trial thereof.

IV

The District Judge erred in rendering judgment in the combined causes in favor of the Plaintiff Augustus Gunter, et al., contrary to the great weight of evidence in the trial thereof.

V

The District Judge erred in assessing the damages for the whole of both farms, separately and severally, at a uniform rate of $7.00 per acre for 417 estimated acres of the whole of the Jacobs farm, and $10.00 per acre for 103 estimated acres of the whole of the Gunter farm, when there was only 115.2 acres of the Jacobs farm taken, and 34.59 acres of the Gunter farm taken on account of the construction of the dam.

VI

The District Judge erred in assessing the damages for the whole of the Jacobs farm at the uniform rate of $7.00 [fol. 154] per acre for 417 estimated acres of the whole thereof, when there was only 115.2 acres of the farm actually taken on account of the construction of the dam.

VII

The District Judge erred in assessing the damages for the whole of the Gunter farm at the uniform rate of $10.00 per acre for 103 estimated acres thereof, when there was only 34.59 acres of the whole farm actually taken on account of the construction of the dam.

VIII

The District Judge erred in assessing damages for the whole of both farms, separately and severally, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Jacobs land; and only 34.59 acres lying between contour elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Gunter farm, and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of both farms lay above elevation 599, not

being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

[fol. 155] IX

The District Judge erred in assessing damages for the whole of the E. P. Jacobs farm, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Jacob's land; and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of the farms that lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

X

The District Judge erred in assessing damages for the whole of the Augustus Gunter farm, based upon estimated acreage, when the evidence conclusively showed that there was only 34.59 acres lying between elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Gunter land; and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of the farm that lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

[fol. 156] XI

The District Judge erred in estimating and arriving at the amount of damages assessed to the E. P. Jacobs farm, by taking the acreage estimated in the description of the Jacobs Lands (said to be 417 acres, more or less), when in fact the Government's surveys by maps made evidence in the cases showed that the Jacobs farm involved could not possibly have exceeded 280 acres, and did not base his

findings upon the actual acreage of the Jacobs farm as shown by the surveys.

XII

The District Court erred in not assessing the damage done to actual acreage affected by the dam on each farm, separately and severally, by bringing about a slight increase of occasional overflows, affecting or applying to 115.2 acres of the Jacobs farm; and 34.59 acres of the Gunter farm lying between contour elevations 592 and 599, Widow's Bar Datum.

XIII

The District Court erred in not assessing the damage done to the actual acreage affected on the Jacobs farm, by bringing about a slight increase of occasional overflows, affecting or applying to 115.2 acres of the Jacobs farm.

XIV

The District Judge erred in not assessing the damage done to the actual acreage affected on the Gunter farm, [fol. 157] by bringing about a slight increase of occasional overflows, affecting or to 34.59 acres of the Gunter farm lying between contour elevations 592 and 599, Widow's Bar Datum.

XV

The District Court erred in holding that the causes were founded on the 5th Amendment of the Constitution of the United States, and required the payment of just compensation, and that just compensation included interest on the value of the properties or rights of flowage therein taken at the time of the taking, from the time of such taking up to the time of the rendition of the judgment.

XVI

The Court erred in allowing interest as a part of the compensation for the lands taken in the causes.

XVII

The District Judge erred in allowing the sum of $1,054.28 as interest as a part of the compensation and damage for the taking of the Jacobs land.

XVIII

The District Judge erred in allowing the sum of $372.00 as interest as a part of the compensation and damage for the taking of the Gunter lands.

[fols. 158-161] XIX

The District Judge erred in rendering judgment against the United States for the costs of the former appeal of the cause of E. P. Jacobs vs. United States to the Circuit Court of Appeals of the United States for the Fifth District.

Wherefore the defendant in the above styled consolidated causes and each of them, pray that the judgment or judgments of the District Court of the United States for the Northeastern Division of the Northern District of Alabama be reversed, and proper judgment or judgments rendered by the Circuit Court of Appeals of the 5th Circuit, or such judgment or judgments rendered by it as should have been rendered by said District Court, or the causes remanded for a new trial thereof, in accordance with such directions as the Circuit Court of Appeals may direct.

This January 6th, 1932.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney, for Defendant.

Presented this January 13, 1932.

W. I. Grubb, District Judge.

[fol. 162] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 163] Minute entry of argument and submission, January 3, 1933, omitted in printing.

[fol. 164] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6567

UNITED STATES OF AMERICA, Appellant,

versus

E. P. JACOBS and AUGUSTUS GUNTER, Executor, et al., Appellees

Appeal from the District Court of the United States for the Northern District of Alabama

(February 13, 1933)

Before Bryan, Foster, and Walker, Circuit Judges

OPINION OF THE COURT—Filed February 13, 1933

BRYAN, Circuit Judge:

The United States, for the purpose of improving navigation, constructed Widow's Bar Dam across the Tennessee River. Appellees Jacobs and Gunter, claiming that the dam holds back flood waters which injure their lands located above it, brought separate suits under the Tucker [fol. 165] Act, 28 U. S. C. A. § 41 (20), to recover compensation for the damage done. From an adverse judgment Jacobs appealed and secured a reversal, this court holding that on the facts found by the district judge he was entitled to compensation. Jacobs v. United States, 45 F. (2) 34. Before the second trial the two cases were consolidated, and in each judgment was entered against the United States, including interest on the principal amount awarded as compensation from the date of the completion of the dam. The judgment in the Jacobs case included also the costs of his former appeal. The only assignments of error relied on relate to the items of interest and costs of appeal.

The Acts of Congress authorizing the construction of Widow's Bar Dam (39 Stat. 399; 40 Stat. 1282) did not direct the appropriation of any particular property or authorize payment to be made for flowage rights. Those acts were considered in our former opinion in the Jacobs

case; it was recognized that no right of action existed under them, and held that recovery must be had if at all upon an implied contract. The opinion then proceeded to hold that flowage damage to privately owned property was contemplated by the Government and that the property of Jacobs was taken, not in the commission of a tort for which there would be no liability, but under an implied promise to pay for the resulting damage. 45 F. (2) 34. In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment. United States v. Rogers, 255 U. S. 163. As a general rule however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims. Boston Sand Co. v. United States, 276 U. S. 41. And it is provided by statute that "no interest shall be allowed on any claim up [fol. 166] to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," etc. Revised Statutes § 1091; 28 U. S. C. A. § 284. This statute applies equally to district courts exercising jurisdiction under the Tucker Act "concurrent with the Court of Claims." 28 U. S. C. A. § 41 (20). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest may not be collected "when the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title," because the property owner's only right to bring suit against it in the Court of Claims or in a district court is not founded upon the Fifth Amendment but upon the existence of an implied promise or contract to pay the value of the property taken. United States v. North American Co., 253 U. S. 330. The just cited case is controlling on the question now under consideration. The suit there as here was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, supra, and Seaboard Air Line Ry. v. United States, 261 U. S. 299, were condemnation cases.

In each the North American case was referred to and distinguished on the ground that it was not a condemnation case. In United States v. Cress, 243 U. S. 316, in the course of the opinion the statement was made that the judgments entered in the court below included interest; and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken; and for all that appears interest was calculated only from the date of the judgment. In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered.

[fol. 167] Costs, unless they are directly authorized by statute, are not taxable against the United States. United States v. Chemical Foundation, 272 U. S. 1, 20. Section 152 of the Judicial Code (28 U. S. C. A. § 258) provides for the allowance of costs against the Government, including however only the amounts actually incurred for witnesses and "fees paid to the clerk of the court." The costs referred to are those incurred in the trial court, and there is no provision for costs incurred in the appellate court. Our rule XXXI (4) provides that "no costs shall be allowed in this court for or against the United States." We think therefore that the trial court erred in entering judgment for the costs of this court on the former appeal in the Jacobs case.

The judgments will have to be reversed, and new judgments entered for the damages already ascertained, with interest from the date thereof, and such costs in the district court as are allowed by law. Accordingly, the judgments are reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 168] In United States Circuit Court of Appeals

No. 6567

United States of America

versus

E. P. Jacobs and Augustus Gunter, Executor, et al.

Judgment—February 13, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

[fol. 169] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 170] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed May 17, 1933

In this cause, it is stipulated by the parties that parts of the printed record used in the Court below and filed in this Court on application for certiorari are not material to the decision of the question before this Court and the same may be omitted by the Clerk in printing the record, as follows, to-wit:

(1) All of the bill of exceptions, beginning on page 45, ending on page 141, will be omitted.

(2) Agreement on page 147 will be omitted.

(3) Order to transmit original maps, beginning on page 159, ending on page 160, will be omitted.

(4) Præcipe for transcript, beginning on page 160, ending on page 162, will be omitted.

In lieu of the omitted parts of the record above stated, the Clerk will please print this stipulation in the record, showing the parts omitted.

Chas. C. Moore, Attorney for Petitioners. J. Crawford Riggs, Solicitor General of the United States.

May 16, 1933.

[fol. 170½] [File endorsement omitted.]

[fol. 171] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,503. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 15. E. P. Jacobs and Augustus Gunter, executor of the last will of Mrs. S. B. Gunter, deceased, petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 27, 1933. File No. 15, O. T., 1933.